Filed 11/6/12 In re Nicole S. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re NICOLE S., a Person Coming Under the Juvenile Court Law.	B234868
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES et al., Plaintiff and Respondents, v. PAULINE E., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK86990)

APPEAL from orders of the Superior Court of Los Angeles County, Terry Troung, Commissioner. Reversed.

Michelle L. Jarvis, under Appointment by the Court of Appeal, for Defendant and Appellant Pauline E.

Christopher Blake, under Appointment by the Court of Appeal, for Respondent Minor Nicole S.

Joseph D. MacKenzie, under Appointment by the Court of Appeal, for Respondent Javier E.

No appearance for Plaintiff and Respondent Los Angeles Department of Children and Family Services.

We are asked to resolve competing claims to presumed father status in this dependency proceeding. The juvenile court found Javier E., the stepfather, is the presumed father of the dependent child under Family Code section 7611, subdivision (d) because he held her out to be his own and took her into his home while married to the child's mother, Pauline E. Mother argues that presumed father status should have been given instead to the child's biological father, Dennis S., because he executed a voluntary declaration of paternity. Mother also argues that we must reverse the order denying reunification services to her if we reverse the presumed father finding.

We conclude the juvenile court erred in finding Javier to be a presumed father in light of the voluntary declaration of paternity executed by Dennis. The minor, Nicole, urges us to find the statutory scheme on which this conclusion is based unconstitutional, in violation of her right to familial association with Javier. We conclude, instead, that the Legislature acted within its authority in according fathers who have executed a voluntary declaration of paternity a conclusive presumption of fatherhood. The order naming Javier the presumed father was the basis for the order placing Nicole with him under a family maintenance plan and denying mother reunification services. We reverse that disposition order and the denial of services to mother and remand to the juvenile court for reconsideration of these issues in light of the views expressed in this opinion. As we discuss, this conclusion does not prohibit Javier from exploring other avenues to have Nicole placed with him.

FACTUAL AND PROCEDURAL SUMMARY

Mother was never married to Dennis, the biological father of Nicole. Nicole was born in October 1996. Mother and Nicole lived with Dennis off and on until the child was two years old. Prior to 2011 when these proceedings began, Nicole had little visitation or contact with Dennis. It was not until 2009 that she learned Dennis was her biological father. She saw Dennis only twice after that. Dennis is listed on Nicole's birth certificate as her father. Child support payments for Nicole have been automatically deducted from Dennis's paycheck since she was approximately two years old.

Mother and Javier married in 1998 and have a son, Michael E., who has moderate autism. Nicole believed Javier was her biological father until 2009, when mother told her that Dennis was her biological father. Mother and Javier lived together until 2004, when Javier filed for divorce. The divorce was never finalized. Nicole and Michael had lived with Javier for extended periods, and continue to spend weekends, holidays, and vacations with him.

Javier contacted the Department of Children and Family Services (the Department) in February 2011, to report that Nicole and Michael were victims of emotional abuse, general neglect, and physical abuse by mother. He said mother had been diagnosed with bipolar disorder and was not taking prescribed medication for her condition. He also reported that mother uses methamphetamines and physically and emotionally abuses the children. Nicole told a children's services worker that she was afraid to return to mother's home, and asked Javier not to allow her and Michael to return there. She described seeing her mother and mother's live-in boyfriend frequently using drugs in the bathroom of the hotel room where they lived. According to Nicole, mother called her names, hit her, and slapped her. Mother twice had tried to kick Nicole out of a moving vehicle. Mother made Nicole responsible for the care of Michael's special needs, which includes bathing, feeding, and changing him. Nicole stated she wanted to live with Javier. Michael is unable to speak and could not express his wishes. The children were removed from mother's custody and detained with Javier.

The dependency petition alleged Nicole and Michael were subject to dependency jurisdiction under Welfare and Institutions Code section 300 because of mother's physical abuse, failure to protect the children due to mental illness, failure to take prescribed psychotropic medication, drug abuse, and failure to provide for Michael's special needs. A first amended petition alleged Dennis was the father of Nicole. Dennis appeared at the jurisdictional hearing and requested presumed father status on a form JV-505 Statement Regarding Parentage. He left a blank on the line on that form that called for an indication that paternity had been established by a voluntary declaration of paternity. He submitted a copy of a pay warrant reflecting the deduction of a support

payment. His attorney told the court that Dennis "is in support of whatever Nicole's wishes are regarding the paternity findings." Javier also filed a form JV-505 and requested presumed father status. He said Nicole had lived with him from 1998 to 2004 and from 2008 to 2009.

Dennis testified that he was involved in Nicole's life until she was two years old, and that she had lived in his home. His attorney represented that Dennis "would support [Javier] if he's seeking presumed father status as well." The court said: "I can only assume that a paternity finding was made in that jurisdiction in order for child support judgment to be made, so he [Dennis] was found to be a presumed in that proceeding. It doesn't necessarily mean that it carries over into this proceeding here." Javier brought copies of Nicole's birth certificate to the hearing, which names Dennis as her father. The court found that Dennis is the alleged father of Nicole, and that Javier is her presumed father. Counsel for mother said her client had an affidavit relating to child support that stated Dennis' paternity had been established, but no such affidavit is in the record. The court said there probably was a prior finding that Dennis was the presumed father of Nicole, but said that in dependency, presumed father status requires more than paying child support; it also includes emotional, physical, and financial support. The jurisdictional hearing was continued. Dennis was given unmonitored visits with Nicole.

Nicole testified in camera at the adjudication hearing. She said mother got angry and hit her. Twice mother attempted to push her out of her car. Mother and her live-in boyfriend would lock themselves in their room and smoke drugs in the bathroom for most of the day. Nicole took care of Michael except when they were with Javier.

The juvenile court sustained portions of the amended petition under Welfare and Institutions Code section 300, as amended to conform to proof. The remaining counts were stricken. The children were declared dependents of the court. The court found that return of the children to the home of mother would raise a substantial danger to their physical health and physical and emotional well-being. Michael was placed with Javier, and Nicole was to be suitably placed by the Department. Family reunification services were ordered for mother. Counsel for Javier asked the court to terminate dependency

jurisdiction with a family law order. Counsel for minors, mother, and the Department opposed that request. The court modified its order to delete the provision of reunification services for both children. Instead, it ordered that mother be given referrals for services, including drug tests, parenting classes, individual counseling, and conjoint counseling. Javier was ordered to receive family maintenance services. Dennis was found to be Nicole's alleged father. This timely appeal from these orders followed.

DISCUSSION

Dennis is not a party to this appeal. Mother argues the court should have declared him to be Nicole's presumed father as a matter of law. She relies on the birth certificate naming him as the father of the child and his payments of child support. We agree that mother has standing to raise the issue on appeal and that her notice of appeal encompasses the presumed father issue. (See *In re Kenneth J.* (2008) 158 Cal.App.4th 973, 978; *Gabriel P. v. Suedi D.* (2006) 141 Cal.App.4th 850, 864.)

"Presumed fatherhood status under [Family Code] section 7611 entitles a man to custody of a child. (§ 3010) 'Although more than one individual may fulfill the statutory criteria that give rise to a presumption of paternity, "there can only be one presumed father."' (*In re Jesusa V.* (2004) 32 Cal.4th 588, 603.)" (*Kevin Q. v. Lauren W.* (2009) 175 Cal.App.4th 1119, 1131 (*Kevin Q.*).)

"The Family Code contains several interrelated statutes that together govern the judicial determination of paternity: (1) the Uniform Parentage Act (§ 7600 et seq.) containing rebuttable paternity presumptions; (2) the paternity judgment (or the pre-1997 conclusive paternity presumption) arising from a voluntary declaration of paternity (§ 7570 et seq.); (3) the conclusive paternity presumption for a nonsterile husband who cohabited with the mother at the time of conception, i.e. the presumption concerning the child of a marriage (§ 7540 et seq.; *Craig L. v. Sandy S.* (2004) 125 Cal.App.4th 36, 48); and (4) the Uniform Act on Blood Tests to Determine Paternity (§ 7550 et seq.)." (*Kevin Q.*, *supra*, 175 Cal.App.4th at pp. 1130–1131.) Only the first two of these statutory schemes are pertinent here.

Under Family Code section 7611 (section 7611), a man is presumed to be the natural father of a child if he has filed a voluntary declaration of paternity under Chapter 3 (commencing with section 7570) of Part 2 of the Uniform Parentage Act. The question of Dennis' presumed father status arises under that statutory scheme. Javier's claim to presumed father status arises under subdivision (d) of section 7611. It provides that a man is presumed to be a natural father where, "[h]e receives the child into his home and openly holds out the child as his natural child."

The critical issue in this case is whether Dennis executed a voluntary declaration of paternity under Family Code section 7576. There is no copy of a voluntary declaration of paternity executed by Dennis in the record. But we have Nicole's birth certificate, in which Dennis is named as the child's father. As we explain, under the governing statutory scheme, this is sufficient to establish that Dennis executed a voluntary declaration of paternity, which in turn gives rise to a conclusive presumption of paternity which overrides any other claim to paternity.

Health and Safety Code section 102425 sets out the information required to be included in a birth certificate. It provides: "If the parents are not married to each other, the father's name shall not be listed on the birth certificate *unless the father and the mother sign a voluntary declaration of paternity at the hospital before the birth certificate is prepared. . . .*" (Italics added.) In these circumstances, hospital staffers witness the parents' signatures on the voluntary declaration of paternity and forward it to the Department of Child Support Services. (Fam. Code, § 7571, subd. (a).)

The Family Code draws a distinction between voluntary declarations of paternity executed on or before December 31, 1996, and those executed thereafter. A voluntary declaration of paternity executed on or before December 31, 1996 is governed by Family Code section 7576, subdivision (a), which provides: "Except as provided in subdivision (d) [involving blood or genetic tests], the child of a woman and a man executing a declaration of paternity under this chapter is *conclusively presumed to be the man's child*. The presumption under this section has the same force and effect as the presumption

under section 7540."[1] (Italics added.) Declarations of paternity executed after December 31, 1996 have the same force and effect as a paternity judgment, under Family Code section 7573. (*In re Liam L.* (2000) 84 Cal.App.4th 739, 744–745 (*Liam L.*).)

Nicole's birth certificate was accepted for registration by the local registrar on October 24, 1996. From this, and applying the official duty presumption of Evidence Code section 664, and in the absence of any evidence to rebut that presumption (*In re Raphael P.* (2002) 97 Cal.App.4th 716, 738–739), we conclude that the voluntary declaration of paternity required by Health and Safety Code section 102425 was executed by Dennis and mother before that date. Since it must have been executed before December 31, 1996, Dennis is conclusively presumed to be Nicole's father under Family Code section 7576, subdivision (a).

Significantly, subdivision (e) of Family Code section 7576 provides: "A presumption under this chapter shall override all statutory presumptions of paternity except a presumption arising under Section 7540 or 7555."[2] This case does not involve a presumption arising under Family Code sections 7540 (arising from birth during marriage) or 7555 (arising from paternity index based on genetic markers). The net effect of this statutory scheme is that the voluntary declaration of paternity Dennis had to execute in order to be listed as father on Nicole's birth certificate overrides any other statutory presumption of paternity, including Javier's claim under section 7611, subdivision (d).[3]

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[1]Family Code section 7540 raises a presumption of paternity arising from the birth of a child during marriage and does not apply here.

[2]After the 2011 orders which are the subject of this appeal were made, subdivision (e) of Family Code section 7576 was amended to read: "A presumption under this chapter shall override all statutory presumptions of paternity except a presumption arising under Section 7540 or 7555, or as provided in Section 7612." (Stats. 2011, ch. 185, § 2, (A.B. 1349), effective January 1, 2012.)

[3]The conclusive presumption accorded a voluntary declaration of paternity executed on or before December 31, 1996 was recognized by the court in *Liam L.*, *supra*,

While Javier may have qualified as a presumed father under section 7611, subdivision (d), that presumption is overcome by the voluntary declaration of paternity executed by Dennis. The juvenile court erred in finding that Javier was the presumed father of Nicole, while according Dennis only alleged father status.

Nicole argues that application of the conclusive presumption of paternity violates her fundamental and constitutionally protected interest in maintaining her familial relationship with Javier which cannot lightly be overcome even if it is not based on genetics. She contends that "[f]amilial association" is a fundamental right that is protected by the federal and state constitutions, citing *Santosky v. Kramer* (1982) 455 U.S. 745, 760 (*Santosky*) and *Moore v. East Cleveland* (1977) 431 U.S. 494, 499 (*Moore*). Nicole also relies on *In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1315–1316 (*Santos Y.*).

In *Santosky*, *supra*, 455 U.S. 745, the Supreme Court held that a New York statute allowing severance of parental rights based on a "'fair preponderance of the evidence'" standard violates the Due Process clause of the Fourteenth Amendment. (*Id*. at p. 768.) Instead the appropriate standard of proof is "clear and convincing evidence." (*Id*. at p. 769.) Here there is no issue regarding the standard of proof. In *Moore*, *supra*, 431 U.S. 494, the Supreme Court concluded that a city ordinance that limited single family housing to narrow categories of related individuals violated the due process clause of the Fourteenth Amendment. It concluded that the ordinance only minimally served the stated goals of preventing overcrowding, minimizing traffic and parking congestion, and

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84 Cal.App.4th at p. 745, fn. 6: "[T]here is still a conclusive presumption of paternity arising from voluntary declarations of paternity signed on or before December 31, 1996. ([Fam. Code,] § 7576, subd. (a).)" (See also *Kevin Q.*, *supra*, 175 Cal.App.4th at p. 1133 [same].) This voluntary declaration of paternity overrides the rebuttable presumption of section 7611, subdivision (d), given to a man who takes a child into his home and holds the child out as his own. (See *In re Levi H.* (2011) 197 Cal.App.4th 1279, 1290.) The *Kevin Q.* court recognized that "a pre-1997 voluntary declaration of paternity "'overrides'" the rebuttable presumptions created by section 7611's subdivisions. ([Fam. Code,] § 7576, subd. (e).)" (*Kevin Q.*, *supra*, 175 Cal.App.4th at p. 1138.)

avoiding an undue financial burden on the school system. (*Id*. at pp. 499–500.) In so holding, the Supreme Court recognized that the right of freedom of choice in matters of marriage and family life is one of the liberties protected by the due process clause. (*Id*. at p. 499.) *Moore* is distinguishable because that case involved the constitutional rights of biologically related family members.

California courts have acknowledged that the United States Supreme Court has reserved decision on the nature of a child's interests in preserving established familial or family-like bonds.[4] There is a dispute in the appellate courts, in the context of cases concerning the Indian Child Welfare Act, as to whether the child's right to a stable and permanent placement rises to the level of a federal constitutional right. (*H.S. v. N.S.* (2009) 173 Cal.App.4th 1131, 1139, fn. 11 (*H.S.*).) Nicole relies on the approach taken *In re Santos Y., supra*, 92 Cal.App.4th 1274. In that case, the California Court of Appeal held that the Indian Child Welfare Act was unconstitutional where applied to require transfer of child from a de facto family to placement with a member of an Indian tribe to which the child had only a one-quarter genetic connection. (*Id*. at p. 1316.) In so holding, the court recognized the right of a child to preservation of family or "family-like" bonds and applied a strict scrutiny analysis. (*Id*. at pp. 1314–1315.)

The court in *H.S.* did not align with either view, but concluded instead "there is no dispute that the child's right to stability is a compelling, highly important interest that must be balanced against the parental right to custody. (See *In re Jasmon O.* [(1994)] 8 Cal.4th [398,] 419 [child has 'fundamental' right to stable, permanent placement]; *In re Marilyn H.* [(1993)] 5 Cal.4th [295,] 306 [child has 'compelling' right to stable, permanent placement].)" (*H.S.*, *supra*, 173 Cal.App.4th at p. 1139, fn. 11.) We conclude that while Nicole has no federal constitutional right to placement with Javier, she does

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[4]In *In re Vincent M.* (2007) 150 Cal.App.4th 1247, the court discussed the limited constitutional rights of children: "A 'fundamental right' or 'fundamental interest' is not necessarily a *federal constitutional right*. The California Supreme Court has *never held*, . . . that a child has a *federal constitutional right* to a stable placement." (*Id*. at p. 1266; see also *In re Santos Y., supra*, 92 Cal.App.4th at p. 1314.)

have a compelling interest protected by the California constitution. We must balance that interest with the purposes underlying the conclusive presumption accorded a voluntary declaration of paternity.

The Legislature expressly identified a compelling state interest for adoption of the voluntary declaration of paternity statutory scheme. It declared: "(a) There is a compelling state interest in establishing paternity of all children. Establishing paternity is a first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including, but not limited to, social security, health insurance, survivor's benefits, military benefits, and inheritance rights. Knowledge of family medical history is often necessary for correct medical diagnosis and treatment. Additionally, knowing one's father is important to a child's development. [¶] (b) A simple system allowing for establishment of voluntary paternity will result in a significant increase in the ease of establishing paternity, a significant increase in paternity establishment, an increase in the number of children who have greater access to child support and other benefits, and a significant decrease in the time and money required to establish paternity due to the removal of the need for lengthy and expensive court process to determine and establish paternity and is in the public interest." (Fam. Code, § 7570.)

California courts have recognized the purposes underlying the voluntary declaration of paternity: "'The paternity presumptions are driven by state interest in preserving the integrity of the family and legitimate concern for the welfare of the child. The state has an "'interest in preserving and protecting the developed parent-child . . . relationships which give young children social and emotional strength and stability.'" [Citations.]" (*In re Raphael P., supra,* 97 Cal.App.4th at p. 728, quoting *Steven W. v. Matthew S.* (1995) 33 Cal.App.4th 1108, 1116.)

In light of this expression of the purposes underlying voluntary declarations of paternity as applied in the context of a dependency proceeding, we find no constitutional violation. The statutory scheme allows a father to voluntarily establish his status as a presumed parent. The Legislature chose to give this status conclusive effect in dependency proceedings under Family Code sections 7576 and 7611. The presumption

established by the California statutory scheme, which centers on the voluntary declaration of paternity, is hardly irrational. It reflects a legislative choice in favor of the purpose it expressly declares. If changes are in order they should come from the Legislature, not this court. The dependency scheme also provides alternative methods for maintaining Nicole's relationship with Javier, including placement with him.

Nicole argues against rigid application of the Uniform Parentage Act (Fam. Code, § 7600 et seq.), which she describes as "antiquated" because it does not recognize the kind of relationship she has with her stepfather, Javier. Nicole proposes that "a stepfather, like Javier, who has clearly established himself as the psychological father should be treated as a parent for placement purposes under Welfare and Institutions Code section 361.2, which allows a dependency court to place a child with a non-offending, non-custodial parent."

Nicole asks that we accept this solution, citing dependency cases in other contexts which she claims found similar methods to adapt the dependency laws to current social arrangements. In *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, the Supreme Court held that section 7611 and the related statutory scheme violated federal guarantees of equal protection and due process for unwed fathers to the extent they allowed a mother to unilaterally deprive a man of paternal rights by secreting child, even if he has done all he can to promptly come forward and assert his commitment to the child. (*Id*. at p. 849.) In *In re Nicholas H.* (2002) 28 Cal.4th 56, 70, and *In re Jesusa V.* (2004) 32 Cal.4th 588, 606, the Supreme Court held that a man who is not a biological father may nevertheless qualify as a presumed father under section 7611. Nicole also relies on cases extending the same principle to women who lack biological ties to a child but seek to be named a presumed parent. (*In re Karen C.* (2002) 101 Cal.App.4th 932 and *In re Salvador M.* (2003) 111 Cal.App.4th 1353.) Finally, Nicole argues that courts have departed from the rule that there can only be one presumed father or mother in cases involving same sex couples.

Neither *In re Nicholas H.*, *supra*, 28 Cal.4th 56 nor *In re Jesusa V.*, *supra*, 32 Cal.4th 588 involved a conclusive presumption under a voluntary declaration of

paternity. Similarly, the cases cited which involve efforts by a woman who is not the biological mother or is a same-sex partner, to be named a presumed parent, do not involve such a conclusive presumption.

The rationale of *Adoption of Kelsey S., supra,* 1 Cal.4th 816, does not apply to our analysis because here the issue is not an effort by a father to obtain rights regarding a child kept away by the mother, as in that case. The Supreme Court concluded there was a lack of any substantial relationship between the state's interest in protecting a child and allowing the mother sole control over the child's destiny by preventing the father from obtaining presumed status by secreting the child. (*Id.* at pp. 846–847.)

In re Jerry P. (2002) 95 Cal.App.4th 793, cited by Nicole, also did not involve a father who had a conclusive presumption of paternity under a voluntary declaration of paternity. In that case, the court held that "'*Adoption of Kelsey S.* applies to dependency proceedings and therefore Family Code section 7611 and the related dependency scheme violate the constitutional rights of a man seeking presumed father status to the extent they permit a mother or third person to unilaterally deny him that status by preventing him from receiving the child into his home.' ([95 Cal.App.4th] at p. 797, fn. omitted.)" (*In re Vincent M.* (2008) 161 Cal.App.4th 943, 965 [addressing status under section 7611 rather than under a voluntary declaration of paternity].) Nicole relies on language in *In re Jerry P.* describing the father, who was not a biological father, as an "'equitable father'" or as a "'Horton father,'" terms used to describe a man who nurtures a child without a biological tie. (*In re Jerry P., supra,* 95 Cal.App.4th at p. 813.)[5] Since Javier satisfied the conditions of section 7611, subdivision (d) to be considered a presumed father, it was not necessary for him to resort to an equitable status.

Finally, we note that Javier may seek to preserve his relationship with Nicole through other means. For example, he may seek a declaration that he is Nicole's de facto parent, under California Rules of Court, rule 5.502(10) defining de facto parent as a

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[5]*In re Jerry P.* was decided nearly six months before the court in *In re Nicholas H., supra,* 28 Cal.4th 56 ruled that a man who is not a biological father may nevertheless qualify as a presumed father under section 7611.

person "who has been found by the court to have assumed, on a day-to-day basis, the role of parent, fulfilling both the child's physical and psychological needs for care and affection, and who has assumed that role for a substantial period." (See also Cal. Rules of Court, rule 5.534 regarding participation of de facto parents in dependency proceeding; *In re Jerry P., supra*, 95 Cal.App.4th 801 [stepfather may be de facto father].) He also may seek to have Nicole placed with him under Welfare and Institutions Code section 361.3, subdivisions (a) and (c) (defining stepparent as a relative eligible for preferential placement.) Alternatively, Javier may seek to have Nicole placed with him as a nonrelative extended family member under Welfare and Institutions Code section 362.7. (*In re Cheyenne B.* (2012) 203 Cal.App.4th 1361, 1378, fn. 21.)

In re D.S. (2012) 207 Cal.App.4th 1088 (*D.S.*) is instructive. In that case, the court rejected an argument that principles of due process and equal protection require that both a putative mother and a father may establish the conclusive presumption of parentage under Part 2 of Division 12 of the Family Code, which includes the provisions for voluntary declarations of paternity. The court reasoned that the Legislature could have created the same or similar mechanisms for conclusively determining parentage for both mother and father because it "'is deemed to be aware of statutes and judicial decision already in existence, and to have enacted or amended a statute in light thereof.' [Citation.]" (*Id*. at p. 1101.)

Our case is similar. In 1996, the Legislature enacted Family Code section 7576 creating a conclusive presumption of paternity based on a voluntary declaration of paternity when there already was a well-established procedure to allow a man to attain presumed father status by welcoming a child into his home and holding the child out as his own. (Stats. 1996, ch. 1062, § 11.)[6] It chose to create a presumption based on the

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[6]The procedure to allow a father to become a presumed father by welcoming a child and holding him or her out as his own, now codified in section 7611, subdivision (d) was originally added to the Civil Code in 1975, former section 7004, subdivision (a)(4). (Stats. 1975, ch. 1244, § 11, continued in section 7611 without substantive

voluntary declaration which would rebut the presumed father status under section 7611, subdivision (d).

In summary, we conclude since Dennis is the presumed father of Nicole, the court erred in finding Javier to be a presumed father. This application of the dependency statutory scheme did not deprive Nicole of her right to family association.

Nicole and Javier argue we should not apply the presumption of Family Code section 7576 on public policy grounds, citing *Comino v. Kelley* (1994) 25 Cal.App.4th 678 (*Comino*) and *County of Orange v. Leslie B.* (1993) 14 Cal.App.4th 976 (*Leslie B.*). In *Comino*, mother Stephanie appealed from a judgment of paternity in favor of Comino, who was found to be the presumed father of her child. The Court of Appeal concluded that the trial court properly refused to apply the conclusive presumption of former Evidence Code section 621 to establish the paternity of Stephanie's husband Jeffrey. The marriage was a business relationship which allowed Jeffrey to receive a married man's military privileges, while Stephanie received medical insurance as a dependent and could share rent with Jeffrey. They did not have a sexual relationship, and each dated other people. During the marriage, Stephanie became sexually involved with Comino, and became pregnant. She told Comino he was the father of her child. She moved in with Comino a few weeks before the birth of the child. She named Comino as father on the child's birth certificate. (*Id*. at pp. 681–682.) Stephanie and Comino took the child into a home they shared and held him out as Comino's natural son for two and one-half years. But Stephanie later left Comino, moved in with Jeffrey, and told Comino for the first time that he might not be the biological father of the child. Comino brought an action to establish his parental relationship. In her answer, Stephanie argued that Jeffrey was the father of the child as a matter of law based on their marriage and cohabitation under former Evidence Code section 621, subdivision (a), which created a conclusive

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change; 23 Cal. Law Revision Com. Rep. 1 (1993); see also *Adoption of Kelsey S.*, *supra*, 1 Cal.4th 816, 825.)

presumption that the issue of a wife cohabiting with her husband is a child of the marriage. The trial court adjudged Comino to be the father.

The Court of Appeal found that none of the policies underlying the presumption of paternity were served by its application in *Comino* because there was no marriage or family unit to preserve. This was because the case involved a marriage of convenience, and the child had never lived in a family unit with Stephanie and Jeffrey. The trial court therefore was correct in declining to apply the presumption. (*Comino*, *supra*, 25 Cal.App.4th at pp. 684–685.)

In *Leslie B.*, the district attorney filed a complaint against two men to establish paternity in order to provide support for a child. The first man, Gregory, was married to and lived with the child's mother when the child was conceived. But they later separated and divorced. Blood tests ruled him out as the biological father. The second man, Leslie, was having sexual relations with the mother at the relevant time period and blood tests established it was virtually certain he was the biological father. The trial court so found. Leslie appealed, arguing the court was obliged to apply the conclusive presumption of former Evidence Code section 621 to name Gregory the child's legal father. That argument was rejected. First, the court noted that Leslie was attempting to use the conclusive presumption to shield himself from responsibility rather than to ensure involvement in the life of his child. The Court of Appeal also weighed the competing state and private interests in determining whether the presumption should apply. (*Leslie B.*, *supra*, 14 Cal.App.4th at p. 981.) "Traditionally, it was stated that the presumption was designed to preserve the integrity of the family unit, protect children from the legal and social stigma of illegitimacy, and promote individual rather than state responsibility for child support. [Citations.]" (*Id*. at p. 980.) In *Leslie B.*, the court found that there was no family unit to preserve, the child had no ties with Gregory, knew he was not her father, and had never been held out to be his daughter. The state's interests were satisfied by having Leslie declared the legal father. (*Id*. at p. 983.) Under these circumstances, it declined to apply the presumption that Gregory was the child's father based on the brief marriage. (*Ibid.*)

Our case is distinguishable. Here, we address the application of the presumption arising from a voluntary declaration of paternity rather than the presumption of paternity applicable to a child born during a marriage. As in *Comino* and *Leslie B.*, we weigh the competing private and state interests in determining whether the presumption of Family Code section 7576 should apply. (*Leslie B.*, *supra*, 14 Cal.App.4th at p. 981.) In *Comino* and *Leslie B.*, the absence of an authentic marriage and family unit gave the state little interest in naming the person who was married to the mother the legal father of the child. But here, as we have discussed, the state has identified compelling interests in establishing the paternity of a child. We recognize Nicole's significant interest in her relationship with Javier. But even though Dennis is her presumed father, there are other alternatives, which we have discussed, by which Nicole and Javier may continue their relationship, both in the short term and long term. We conclude that policy concerns do not bar application of the presumption of Family Code section 7576.

Mother was denied reunification services under Welfare and Institutions Code section 361.5 because Nicole had been placed with Javier who at that point had the status of presumed parent. Welfare and Institutions Code section 16507, subdivision (b) provides: "Family reunification services shall only be provided when a child has been placed in out-of-home care, or is in the care of a previously noncustodial parent under the supervision of the juvenile court." The court in *In re Pedro Z.* (2010) 190 Cal.App.4th 12 (*Pedro Z.*) held that reunification services are not available to a parent when, at the disposition hearing, the child is returned to the custody of a parent. (*Id*. at p. 19.) Instead, the *Pedro Z.* court explained that where a child is adjudged a dependent, but is placed in the custody of a parent, family maintenance services, rather than reunification services, are provided under Welfare and Institutions Code section 362, subdivision (b) applies. (*Id*. at pp. 19–20.) In such circumstances, the court is not concerned with reunification, but with determining whether dependency jurisdiction should be terminated, or whether further supervision of the family is required. (*Id*. at p. 20.)

Since we reverse the order naming Javier a presumed father, it follows that the order of family maintenance, and the resulting denial of reunification services to mother

also must be reconsidered because even if placed with Javier, Nicole will not be in the custody of a parent within the meaning of Welfare and Institutions Code section 361.5. We remand to the court for a new disposition hearing consistent with the views expressed herein.

DISPOSITION

The orders finding Javier to be a presumed father, placing Nicole with him under a family maintenance plan, and ordering no reunification services for mother are reversed, and the case is remanded to the juvenile court for further proceedings consistent with the views expressed in this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.